

Editor's note: 82 I.D. 1; Clarification by order dated March 27, 1975 See 18 IBLA 319A & B below; Overruled See Sky Pilots of Alaska, 40 IBLA 355 (May 14, 1979)

CLARK COUNTY SCHOOL DISTRICT

IBLA 74-78

Decided January 6, 1975

Appeal from decision of the Nevada State Office, Bureau of Land Management, declaring divestiture of title to lands granted under the Recreation and Public Purposes Act (Nev. 043486).

Affirmed.

1. Patents of Public Lands: Generally--Public Lands: Disposals of:
Generally--Recreation and Public Purposes Act: Generally

The Recreation and Public Purposes Act, and the pertinent regulations thereunder, require that a grantee of land under the Act must develop the land in accordance with the specified uses proposed in the patent application within a reasonable time following the date of issuance of patent.

2. Patents of Public Lands: Generally--Public Lands: Disposals of:
Generally--Recreation and Public Purposes Act: Generally

Failure over a seventeen-year period to develop land patented under the Recreation and Public Purposes Act in accordance with the specified public uses proposed in the patent application and set out in the patent is a violation of the condition in the patent which provides that if the lands are devoted to a use other than that for which they were conveyed title shall revert to the United States.

APPEARANCES: Thurman White, Associate Superintendent, School Facilities Division, Clark County School District, for appellant; David S. Mercer, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Clark County School District has appealed from a decision of the Nevada State Office, Bureau of Land Management (hereafter BLM), dated July 25, 1973, which held that appellants' failure over a

seventeen-year period to develop any of the uses specified in a patent to land granted under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1954), was a violation of the reversionary provision of the patent which effected a divestiture of the School District's title to the land and the reversion thereof in the United States.

The history of this case goes back a number of years. On January 3, 1956, in accordance with the requirements of the Recreation and Public Purposes Act, the Las Vegas Union School District (predecessor to appellant Clark County School District) filed application Nevada 043486 for approximately 337 acres of land in the vicinity of Las Vegas. In its application, the School District stated that it wanted the lands for:

Public schools, high schools, university or educational sites, school administrative sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities.

No target date was given for the construction of the proposed facilities.

Thereafter, pursuant to the provisions of the Act, the United States, on July 26, 1956, issued Patent No. 1162525 to the School District for 196.72 acres of land. The five-acre tract in dispute

in this appeal, lot 48, sec. 23, S 1/2 NE 1/4 SE 1/4 NE 1/4, T. 21 S., R. 61 E., Mount Diablo Meridian, Nevada, was included among the patented lands. With respect to the 140 acres remaining unpatented, application Nevada 043486 was suspended pending the clearance of mining conflicts from the land.

At the time of the grant, the Act provided that:

* * * If at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States.

43 U.S.C. § 869-2 (1954).

The section further provided that the above provision would cease to be in effect 25 years after the issuance of the patent. The pertinent regulation thereunder provided that:

All patents under this act will contain a clause providing that if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without consent of competent authority, title shall revert to the United States. This clause will terminate 25 years after issuance of the patent.

43 CFR 254.10(c) (1954). 1/

1/ The present regulation, with some modification, is to the same effect. See 43 CFR 2741.8 (1973).

In accordance with the above requirements of the Act and regulation, the patent under which the School District took title to the land in question included a clause which provided that:

If the patentee or successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than public schools, high schools, university or educational sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities without consent of competent authority, title shall revert to the United States.

This restriction terminates on July 26, 1981, 25 years after issuance of the patent.

On February 15, 1961, appellant submitted an additional application, Nevada 056834, for scattered school sites in the Las Vegas area. The School District also indicated its continued interest in acquiring the remaining tracts in application Nevada 043486. Both applications were processed together.

By letter dated January 13, 1967, the BLM informed appellant that some of the lands pending in Nevada application 043486 had become available for disposal to the School District. The BLM advised appellant that a lease only would be authorized if construction was not scheduled to begin within 18 months after issuance of the patent. Appellant responded by letter dated January 17, 1967, requesting that a lease be prepared for the available land.

On January 31, 1967, the BLM conducted a land report compliance check on appellant's land to determine if sites patented under the Recreation and Public Purposes Act were being improved, used, and maintained consistent with the public purposes for which they were conveyed. The report indicated that out of 51 lots included within Patent No. 1162525, only four had been developed. Lot 48 was among the 47 lots that were still vacant.

Following this compliance check, the BLM wrote a letter to appellant, dated February 13, 1967, which read in pertinent part as follows:

By the filing of * * * application, Nevada 043486, in January, 1956, * * * Clark County School District represented to the Bureau that construction of schools and related facilities were definitely proposed projects. Regulations then and now in effect prohibit conveyance by patent absent a showing that development and use of the land are imminent.

We therefore request that you advise us of your present plans for use of the undeveloped land described above, if any, or show cause why title to the [land] should not revert to the United States.

In a reply, dated March 8, 1967, appellant responded as follows:

The lands are still intended for the definitely proposed projects described in the original application and there still exists the probability that each of the projects will be fully implemented within a reasonable

time. As you know the rate of growth in population in Clark County has not proceeded at a uniformly fast rate. In fact, we are now at a low ebb of increase but see definite signs of a new spurt of growth in the near future.

The BLM, at that point, took no further action with respect to the lands listed in appellant's patent.

Sometime in 1971, a representative from St. Viator Community Center, Las Vegas, Nevada, approached appellant with an offer to buy or lease lot 48. Appellant did not want to relinquish title to the land in favor of the Center, but the School District was amenable to a leasing arrangement. However, upon inquiry to the BLM, appellant was informed that a lease to the Center would not be in keeping with the Recreation and Public Purposes Act as the School District would no longer have effective control over the land. Negotiations between the parties then ceased.

Thereafter, on December 20, 1972, the Roman Catholic Bishop of Reno, Nevada, applied for the subject site under the Recreation and Public Purposes Act for the purpose of expanding the St. Viator Community Center which is contiguous to lot 48. In a letter accompanying its application, the following is stated:

The School Board has not made any attempt to develop the land since patent was issued. Discussions with the school district indicate they have no intention of any development. Rather they wish to sell the property for revenue purposes.

On January 30, 1973, another land report compliance check was conducted by the BLM on the subject property to determine the extent of use by appellant for school site purposes. The report stated the following:

[A]pplicant has made no attempt to develop this parcel [sec. 23, lot 48] for the intended educational facilities as stipulated in patent grant on July 20, 1956. 2/ The land remains undeveloped (see photos) with no past attempts to construct any type of public school improvements. Telephone conversation with Mr. Deveney, School District Realty Agent, on January 30, 1973, revealed that the District had no plans for development of subject parcel.

Based on this report, the Bureau requested that the School District voluntarily reconvey the land to the United States. The School District refused.

Thereafter, the Bureau made one final plea to the School District regarding voluntary reconveyance. In a letter from the Bureau to appellant, dated March 14, 1973, the following is stated:

You will recall our discussions about the parcel of land on Eastern Avenue patented to the School District, along with other lands, in 1956. You indicated that the District would not voluntarily reconvey the land even though there are no present plans to develop the site for school purposes.

We have before us now an application from the Roman Catholic Bishop of Reno for the site. The

2/ The correct date is July 26, 1956.

application is properly supported by development and management plans which demonstrate a need for and capability to use the land for purposes contemplated by the Recreation and Public Purposes law.

In view of the School District's long continuing failure to develop and use the site and the apparently bona fide competing demand for it, I request that the Board reconsider its position in the matter and reconvey the parcel.

[Y]ou inquired about the possibility of the District leasing the land to the Church and retaining title. I believe such an arrangement would be inconsistent with the law and that we could not approve it.

In a letter dated May 2, 1973, appellant, through its Associate Superintendent, responded as follows:

I am sympathetic to the needs of the Roman Catholic Bishop of Reno for the parcel. Indeed this office has attempted to find some way of making the property available to the church while safeguarding the District's rights to future use of the property.

Availability of public lands in the fast growing Paradise Valley is very scarce. Private land when available is expensive and is becoming much harder to obtain. The property in question has a real potential of utilization by the District as an annex to the present Education Center, a short distance away on Flamingo Road.

The administration cannot recommend to the Board of School Trustees that the site be reconveyed to the federal government. This decision, of course, may be appealed directly to the Board of School Trustees.

Following this train of events, the Nevada State Office, BLM, in its decision dated July 25, 1973, determined that the Recreation

and Public Purposes Act, and the pertinent regulations thereunder, required that a grantee of land under the Act must actually put the land to the specified uses proposed within a reasonable time from the date of the issuance of patent. As noted above, the State Office concluded that appellant's failure to develop the patented land for over 17 years was an unreasonable length of time for nondevelopment and violated the reversionary provision of the patent which required that the land could not be devoted to a use other than that for which the lands were conveyed. Accordingly, the State Office held that this extended nonuse effected a divestiture of the School District's title to the land and the reversion thereof in the United States.

On appeal, Clark County School District generally presents three arguments:

(1) The State Office decision holding that the reversionary clause in appellant's patent was activated and divestiture occurred due to nondevelopment of the subject property during the 17-year period was based on an unreasonable and narrow construction of the law governing compliance with the terms of the Recreation and Public Purposes Act.

(2) The Bureau of Land Management has acted in a discriminatory fashion as it has not attempted to apply similar compliance

criteria to undeveloped lands acquired under the Recreation and Public Purposes Act and held by other public agencies.

(3) The Bureau of Land Management, Nevada State Office Manual, page 2, Appendix 2, January 21, 1970, provides that even assuming less than satisfactory compliance with the Act,

a- the recipient is "allowed to prepare and submit a new plan of development in accordance with 43 CFR 2232.1-2." 3/

or

b- the recipient is "allowed to pay the amount equal to the difference between the price paid for the land and 50% of the fair market value of the land as of the date of patent plus compound interest computed at 4%." 4/

Appellant requests that the Department give it either of the two above options rather than declaring divestiture of its title to the subject land.

3/ The School District's County Board of Trustees held a meeting on August 23, 1973, wherein they approved a project for the subject site. Appellant has submitted a new application offered as an amendment to its original application in which it proposes to use the site for educational television facilities. Construction would begin in 1978 if a general obligation bond to be submitted to the electorate of Clark County, sometime in 1974, were approved. It is questionable whether this proposal with its 1978 construction date and speculative financing meets the requirements of a "definitely proposed project" as specified in the Act.

4/ Regardless of the instructions in the Office Manual, the law does not provide for a sale on the terms requested by the School District. The Recreation and Public Purposes Act provides that sales "shall be made at a price to be fixed by the Secretary of the Interior through appraisal or otherwise, after taking into consideration the purpose for which the lands are to be used." 43 U.S.C. § 869-1(a) (1970). 43 CFR 2741.7(c) (1973), provides that sales "will be made

In its first argument on appeal, the School District justifies its nondevelopment of the subject land for over seventeen years on the basis that neither the original application nor the patent for the land specified a timetable for development. In the absence of such a specific demand from the Department, appellant argues that it is unreasonable at this point to construe the law so as to decide that the School District has failed to comply with the provisions of the patent. We are not persuaded by this argument.

The Recreation and Public Purposes Act, the regulations thereunder, and the legislative history of the Act, all indicate that Congress intended that any land granted under the Act must be used for the specifically proposed public project listed in the patent within a reasonable time from the date of issuance of the patent. When the land was conveyed, the Act provided that land disposed of was "to be used for an established or definitely proposed project." 43 U.S.C. § 869(a) (1954). 5/ In discussing this requirement, the House Committee on Interior and Insular Affairs, in House Report No. 353, May 7, 1953, (H.R. 1815), stated the following:

[I]f disposition of lands is to be made for other than recreational purposes, the Secretary

fn. 4, cont.

at prices fixed through appraisal of the fair market value or otherwise, taking into consideration the purpose for which the land will be used."

5/ 43 U.S.C. § 869(a) (1970) is to the same effect.

of the Interior must have proof that the land will be used for an established or definitely proposed project.

When H.R. 1815 passed the House and was before the Senate Committee on Interior and Insular Affairs, the Department of the Interior submitted a report on the bill as amended by the House. The Department interpreted the "established or definitely proposed project" requirement as follows:

[P]ublic lands should not be disposed of to a local Government agency if such agency has only vague plans for possible utilization of the lands some time in the indefinite future. * * * Under this language ["an established or definitely proposed project"] this Department could require the proposed beneficiary to show that it has taken such action as may be practical to secure needed local authorization for the project, to make definite plans for the type of facilities to be developed, and to make adequate funds available before title to the lands is actually transferred. 6/

Regulation 43 CFR 254.5(b) (1954) was adopted shortly after enactment of the 1954 Act. It clearly shows the contemporaneous administrative interpretation of the Act:

Applicants will not be granted title to or use of land under the act except for an established or definitely proposed project. A definitely proposed

6/ The report was dated March 5, 1954, from Orme Lewis, Acting Assistant Secretary of the Interior, to the Hon. Hugh Butler, Chairman of the Senate Committee on Interior and Insular Affairs.

project is a project which has been authorized by competent authority irrespective of whether or not it has been financed and otherwise fully implemented, providing that there exists the probability that it will be fully implemented within a reasonable time.

Particular attention should be directed to the proviso requiring that there exist "the probability that it will be fully implemented within a reasonable time."

[1] The facts in this case indicate that the BLM was initially satisfied that the requirements for a "definitely proposed project" were met by the School District's general representation that construction of the enumerated educational facilities listed in appellant's application was to take place on the patented land. The requirement that appellant follow through with its plan to develop a definitely proposed project for use on the land did not expire, however, upon the filing of its application or upon the grant of the patent. The grant to the School District was conditioned upon its representation to devote the land to public use.

The law generally requires that a condition be performed within a reasonable time when there is no express deadline in the conveyance. See Adams v. Ore Knob Copper Co., 7 F. 634, 638 (C.C.N.C. 1880); Union Stockyards Co. v. Nashville Packing Co., 140 F. 701, 706 (6th Cir. 1905); 4 THOMPSON, REAL PROPERTY, Estates § 1889 (1961); 26 C.J.S.

Deeds, § 152 (1955). This interpretation is further buttressed in this instance by 43 CFR 254.5(b) (1954) which required that a definitely proposed project be fully implemented within a reasonable time. Accordingly, we find that there was a continuing obligation to develop the land for the stated public purpose within a reasonable time following the date of issuance of patent.

Appellant became aware of its continuing obligation to develop the land as early as March 14, 1962, when it was informed by a letter decision of the Department that specific construction timetables would thereafter be required to assure the Department that appellant was in fact planning to go ahead with the proposed educational improvements. In January of 1967, appellant was informed that lands pending in Nevada application 043486 could be issued by lease only, if construction was not scheduled to begin within 18 months after issuance of patent. Finally, following the compliance check in 1967, appellant was again informed by the BLM of the requirement that appellant move forward with the construction of its definitely proposed school and related facilities projects.

We assume that appellant dealt with the government in good faith, which includes the intention to observe legal duties. See Kiyoichi Fujikawa v. Sunrise Soda Water Works Co., 158 F.2d 490, 494 (9th Cir. 1946). In its letter response of March 8, 1967, the

School District acknowledged its continuing obligation to comply with the requirements of the Act and stated that it intended to comply as there still existed the probability that the "definitely proposed projects described in the original application [would be] fully implemented within a reasonable time." No development, however, was forthcoming.

Appellant was required to begin construction on its proposed educational projects within a reasonable time following issuance of patent. For over a seventeen-year period there has been no development of any kind on the land involved in this appeal. We find in this instance that appellant, by not developing the land for a seventeen-year period following issuance of its patent, has failed to meet its continuing obligation to develop a definitely proposed project within a reasonable time.

[2] We further find that nonuse of land over an unreasonable period of time after issuance of patent violates the provision of the Act requiring that patented lands not be devoted to a use other than that for which the lands were conveyed. Cf. Robert Ward Morgan, A-26499 (December 10, 1952) at 2. This conclusion is supported by the additional requirement of the Act and regulations that patents only issue for definitely proposed projects. Such projects were defined as those to be completed within a reasonable time. Nonuse of land, which was originally awarded with the intent that it be devoted to public purposes, does not further the public policy of

the Act. To hold otherwise would permit the absurd result of allowing a grantee under patent to hold the land idle for the 25-year reverter period, at the end of which time unrestricted title would be received for land which was never put to use for the public purposes originally intended in the grant.

Thus, the Board concludes that appellant's failure to develop the land for educational used within a reasonable time following issuance of patent is a basis for finding that there had been a violation of the patent's reversionary provision. This construction is in conformity with general law, with the spirit of the Act, and permits the Department, on a continuing basis, to administer the Act to assure that public lands granted thereunder will be devoted to definitely proposed projects within a reasonable time following issuance of patent. 7/

7/ Reference may be made to other acts in pari materia to determine a course or trend of legislation from which a Congressional policy may be identified. Thus, we note that prior to repeal in 1970, the Act of May 13, 1946, 60 Stat. 179, amending the Federal Airport Act, provided in pertinent part that,

"* * * each such conveyance shall be made on the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands in question are not developed, or cease to be used for airport purposes."
(Emphasis added.)

This policy was continued in the Airport and Airway Development Act of 1970, 49 U.S.C. § 1723(b), which requires in part that,

[a] "* * * conveyance may be made only on the condition that, at the option of the Secretary, the property interest conveyed shall revert to the United States in the event that the lands

With respect to appellant's second and third arguments on appeal we find them both without merit. The decision of the BLM to declare a divestiture of appellant's title to the land is in no way discriminatory. See United States v. Howard, 15 IBLA 139, 144-46 (1974); United States v. Zuber, 13 IBLA 193, 197-98 (1973); United States v. Gunn, 7 IBLA 237, 245, 79 I.D. 588, 591 (1972): As for the BLM Official Manual (Appendix) cited by appellant, this is simply an in-house instruction procedure for quinquennial compliance checks on Recreation and Public Purposes Act patents and leases. The instructions do not have the force or effect of law. In any case, appellant failed to fully cite the manual instructions which provide that following a determination that the patentee has not complied with the terms of the grant, the

fn. 7, cont.

in question are not developed for airport purposes or used in a manner consistent with the terms of the conveyance." * * * (Emphasis added.)

In United States v. Sequoia Union High School District, 145 F.Supp. 177 (N.D.Cal. 1956), the court was dealing with an issue arising under the Surplus Property Act of 1944, as amended, 50 U.S.C. § 1622 (1970). In 1948, the United States had conveyed land to the School District pursuant to the Act, and the conveyance contained the following condition:

"[F]or a period of ten (10) years from the date of this conveyance said premises shall be continuously used as and for school purposes and for incidental purposes pertaining thereto, but for no other purposes."

For approximately five years following the grant, the School District made no use whatsoever of the property except to clear weeds therefrom. Based on this nonuse, the court concluded that the premises were not used for school purposes as required by the statutory condition imposed in the deed. The court then held that forfeiture was effected by breach of this condition.

Office should "allow 60 days for patentee to show cause why title to the land should not revert to the United States or request in lieu of forfeiture of title" an alternate plan or a purchase agreement. (Emphasis added.) The manual does not cite any statute or regulation authorizing a sale of land. However, even assuming authority for such a sale exists, we note that the manual makes its exercise discretionary. In this instance, the Bureau properly chose forfeiture in light of appellant's continued inaction. 8/

We conclude that appellant's failure to comply with the requirements of the patent divested it of title and revested the title in the United States. Accordingly, the BLM was correct in informing appellant that a violation of the reversionary provision in the patent had occurred. The case is returned to the Bureau of Land Management to undertake appropriate action to remove the cloud on the United States' title.

8/ While we recognize that the St. Viator Community Center has an interest in obtaining the tract, we point out that at the time it filed its application the land applied for was (and still is) patented land. Until such time as the United States regains title to the tract and the land office records are so noted, the land is not open to the filing of applications. Accordingly, St. Viator Community Center's application must be rejected. William J. Colman, 3 IBLA 322 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion holds that appellant's failure, over a 17-year period, to develop the patented land for any of the uses specified in the patent, constitutes a breach of the grant and reverts title in the United States.

At the time of the grant, the Recreation and Public Purposes Act, 43 U.S.C. § 869-2 (1954) provided that:

* * * If at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States.

The section further provided that the above provision would cease to be in effect 25 years after the issuance of patent. The pertinent regulation under 43 U.S.C. § 869-2 (1954) provided that:

All patents under this act will contain a clause providing that if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without consent of competent authority, title shall revert to the United States.

This clause will terminate 25 years after issuance of the patent. * * *

43 CFR 254.10(c) (1954).

In accordance with the above requirements of the Act and regulation, No. 1162525, issued July 26, 1956, under which the School District took title to the land in question, the patent included a clause which provided that:

If the patentee or successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than public schools, high schools, university or educational sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities without consent of competent authority, title shall revert to the United States.

This restriction terminates on July 26, 1981, 25 years after issuance of the patent.

In its application for the land, Clark County School District stated it wanted the lands for:

Public schools, high schools, university or educational sites, school administrative sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities.

The District admittedly has used the land for none of these purposes; in fact, it has made no use of the land. Thus the primary

issue to be resolved is whether nonuse of the land constitutes a breach of the terms of the instrument of conveyance, or of the statute and regulations under which it was issued.

It is obvious that the plain words of the statute do not authorize a termination of a patent for nonuse. Such a result can only be raised by conjecture.

It is generally safe to reject an interpretation that does not materially suggest itself to the mind of a casual reader * * *.

Shulthis v. MacDougal, 162 F. 331, 340 (E. D. Okla. 1907), quoting from Ardmore Coal Co. v. Bevil, 61 F. 757, 759 (8th Cir. 1894).

The rule that intent governs the meaning of a statute really means the intent as expressed in the statute. United States v. Goldenberg, 168 U.S. 95, 102-103 (1897). There is nothing in the governing statute, regulation, or instrument of conveyance to compel the conclusion that nonuse is a violation of the grant.

The main opinion's resort to the legislative history of the Recreation and Public Purposes Act, to supply what the majority seems to believe was inadvertently omitted, is not well founded. As is indicated below, such resort is appropriate only where the meaning of a statute is doubtful.

This principle is illuminated in United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83-84 (1932), as follows:

Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong., 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong., 3d Sess., pp. 2-4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Wisconsin R. R. Commn. v. C., B. & Q. R. Co., 257 U.S. 563, 588-589; Penna. R. Co. v. International Coal Co., 230 U. S. 184, 199; Van Camp & Sons v. American Can Co., 278 U. S. 245, 253. Like other extrinsic aids to construction their use is "to solve, but not to create an ambiguity." Hamilton v. Rathbone, 175 U. S. 414, 421. Or, as stated in United States v. Hartwell, 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In King v. Commissioners, 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense." See also United States v. Lexington Mill Co., 232 U. S. 399, 409; Caminetti v. United States, 242 U. S. 470, 485.

Even if the legislative history of H.R. 1815 were to be considered, there is nothing in the history cited by the majority which shows that the unexpressed condition subsequent was intended.

It is noteworthy that the governing regulation, 43 CFR 254.10(d) (1954), now substantially embodied in 43 CFR 2741.8, does not address itself to the nonuse situation at all. Obviously the Department could have adopted a regulation which would make nonuse a violation of the grant. It failed to do so. Whether such a regulation would be efficacious as a matter of law is not passed upon.

This Board has held that a regulation should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are deprived of a statutory preference right to a lease. Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971); Georgette B. Lee, 3 IBLA 272 (1971) . A fortiori, a fee holder of land should not be deprived of his title where his violation of a regulatory condition subsequent can only be raised by conjecture.

The statute clearly provides that the title shall revert in the event of either of two contingencies, i.e., (1) transfer of the land to another or (2) devotion of the land to an unauthorized use, both of which require affirmative, overt action by the grantee. The majority perceives that the Congress, in enacting this legislation, actually intended to include a third contingency which would trigger a reverter, to wit: nonuse, a passive circumstance which requires no action by the grantee. Apparently the majority believes that Congress

somehow failed to express this intention and the majority now undertakes to correct this legislative oversight by adding the third contingency by administrative fiat.

Certain hornbook principles apply to the case at bar. It is only when the meaning of a deed is uncertain that resort may be had to well-settled, but subordinate rules of construction, to be treated as such, and not as rules of positive law. In the interpretation of a deed, the unexpressed intent is unavailing. Restrictions as to use in a deed will not be extended by implication to include anything not clearly expressed, and doubts must be resolved in favor of the free use of land. Latchis v. John, 117 Vt. 110, 85 A.2d 575, 32 A.L.R. 2d 1203 (1952).

In Pickle v. McKissick, 21 Pa. 232 (1853), it was held that real estate conveyed to trustees for a schoolhouse and place of religious meetings, with a condition that if used for any other purpose it shall revert to the grantor and his heirs, is not forfeited by mere nonuser.

In Dade County v. North Miami Beach, 69 So. 2d 780 (Fla. 1953), the court held that restrictions in a deed (as to use of land for park purposes) are not favored in law if they have the effect of destroying an estate and they will be construed strictly and will most strongly be construed against the grantor.

In Buck v. City of Macon, 85 Miss. 580, 37 So. 460 (1904), it was held that even if the words in a deed of a lot to the trustees of a township "for the use of a school and no other use" constitute a condition subsequent, breach of which works a forfeiture, such forfeiture is not worked by mere nonuser. The above decisions are illustrative of a firmly established principle of law. ^{1/} We have found no impelling authority to the contrary.

The language of the patent in the case at bar is clearly distinguishable from that employed to establish a reversion in the event of nonuse.

For example, a patent, No. 1228506, issued September 4, 1962, to the State of Alaska, under sec. 16 of the Federal Airport Act, 49 U.S.C. § 1723 (1970), formerly, 49 U.S.C. § 1115, recited in part:

* * * The property interest hereby conveyed shall automatically revert to the United States pursuant to section 16 of the Federal Airport Act, in the event that the lands in question are not developed, or cease to be used, for public airport purposes; and a determination by the Administrator of the Federal Aviation Agency, or his successor in function, that the lands have not been developed, or have ceased to be used for public airport purposes shall be conclusive of such fact. (Emphasis supplied.)

^{1/} See cases cited in 26 C.J.S. Deeds § 154(b) (1956).

This language follows closely that of section 16 of the Federal Airport Act. It clearly shows that Congress, and the Department, used apt language to demonstrate that nonuse or nondevelopment was a sufficient basis to seek the termination of the estate.

Even though the airport patent provides that the "property shall automatically revert" on the breach of the condition and that the "determination of the Administrator * * *" that the condition has been breached "shall be conclusive of such fact," the Federal Aviation Administration has always resorted to court suit to cancel such a patent for breach of condition.

The main opinion, in my judgment, suffers from the vice which the F.A.A. procedure avoids. The majority states:

We conclude that appellant's failure to comply with the requirements of the patent divested it of title and revested the title in the United States.

It is almost axiomatic that the Department has no authority to cancel administratively a patent. 4 Op. Att'y Gen. 120 (1842). Even where a patent issues without authority of law, suit must be maintained to cancel it in a court of competent jurisdiction. United States v. Stone, 69 U.S. (2 Wall.) 525 (1865). United States v.

Minor, 114 U.S. 233 (1885), points out that even where fraud is involved, court suit is necessary. See also Moffat v. United States, 112 U.S. 24 (1884). A patent to public land cannot be annulled for fraud, unless the evidence is unequivocal, clear, and convincing. United States v. Anderson, 238 F. 648 (D. Mont. 1917). Once a patent to public lands has been issued the authority and jurisdiction of the Department of the Interior over such lands ceases and any subsequent claim of the United States to title therein must be determined by the courts. United States v. McKenzie County, 187 F. Supp. 470 (D.N.D. 1960), aff'd 291 F.2d 161 (1961). See also Oregon Ry. & Nav. Co. v. Hertzberg, 26 Or. 216, 37 P. 1019 (1894); Johnson v. Pacific Coast S. S. Co., 2 Alaska 224 (1904), 13 Op. Att'y Gen. 457; Kirwan Murphy, 83 F. 275 (8th Cir. 1897), appeal dismissed, 170 U.S. 205 (1897), United States v. White, 17 F. 561 (C.C.D. Cal. 1883), appeal dismissed, 122 U.S. 647 (1887).

The Department has held consistently over many years that it has no further jurisdiction over land which has been patented. Dorothy H. Marsh, 9 IBLA 113 (1973); Clarence March, 3 IBLA 261 (1971); Unruch v. Stearns, A-30441 (October 27, 1965); Pollyanna Rice, A-30386 (May 12, 1965). Even where a patent has been issued by mistake and inadvertence, it vests title in the patentee and it may be cancelled, if at

all, by court suit within time limitations. Sylvan A. Hart, A-30832 (December 1, 1967). 2/

In an opinion, dated July 25, 1968, the Associate Solicitor, Division of Public Lands, concerning Exchange NM 0557441, advised the Director, Bureau of Land Management as follows:

In 1965 and 1966, we understand, 54,546 acres of Federal lands were conveyed to Mr. Crowder in exchange for 37,544 acres. Although proper publication procedures were followed, it was only after the issuance of patent that mining claimants appeared and brought their claims to the conveyed lands to Federal attention. Consequently we now have a situation where one party (or his successors) holds a Federal patent to the same lands in which other parties claim rights under the mining law. The Forest Service wishes to know whether we intend to take any action on this matter.

On the basis of what has so far come to our attention, we believe that the United States should do nothing. Once a patent has been issued, the Department has lost all jurisdiction over the patented land and all that it can do is recommend that a judicial action be commenced for the annulment of the patent. (Emphasis supplied.)

2/ Judge Stuebing, however, is of the opinion that the reverter may be self-executing upon the occurrence of the expressed contingency, and that the purpose of the subsequent litigation in that event would be to obtain a judicial declaration that the reverter has operated to revest the title in the grantee, so that record will correctly reflect the state of the title. See, e. g., Board et ux. v. Nevada School Dist., 251 S.W. 2d 20 (Sup. Ct. Mo. 1952); cf. Smith v. School Dist. No. 6 of Jefferson County, 250 S.W. 2d 795 (Sup. Ct. Mo. 1952). The clause in the patent would appear to create fee simple determinable estate in the grantee, rather than a fee simple defeasible estate. For distinction, see Introductory Note to Chapter 4, 1 RESTATEMENT OF THE LAW OF PROPERTY (1944).

In sum, I believe that nonuse under the Recreation and Public Purposes Act conveyance here at bar is not a violation of the Act, the regulations, or of the terms of the conveyance. Even assuming, arguendo, that nonuse were such a violation, the Department is without authority to declare that the patentee has been divested of title and that title has been revested in the United States.

Frederick Fishman
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Edward W. Stuebing
Administrative Judge

Mar. 27 1975

IBLA 74-78; 18 IBLA 289	:	Nevada 043486
	:	
CLARK COUNTY SCHOOL DISTRICT	:	Petition for Clarification
:	:	of Decision
	:	
	:	Granted

ORDER

The Office of the Solicitor, Department of the Interior, has submitted a Petition for Clarification of the Board's decision in Clark County School District, 18 IBLA 289 (1975). The petition is granted and the decision is amended by deleting footnote eight (8) of the decision, supra at 307, and substituting therefor the following:

8/ While we recognize that the St. Viator Community Center has an interest in obtaining the tract, we point out that at the time it filed its application the land applied for was noted on the land office records as patented land. Until such time as the land office records are properly noted, the land is not open to the filing of applications. Accordingly, St. Viator Community Center's application must be rejected. William J. Colman, 3 IBLA 322 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for clarification is granted.

Martin Ritvo
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge.

18 IBLA 319A

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

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